1988

Steven H. Swayne v. L.D.S. Social Services, John Doe, and Jane Doe : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STEVEN H. SWAYNE, Plaintiff-Petitioner, Cross-Respondent, vs. L.D.S. SOCIAL SERVICES, JOHN DOE AND JANE DOE, Defendants-Respondents, Cross-Petitioners.	Case No. 880384 (Category No. 7)

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INTRODUCTORY STATEMENT

This brief is filed in reply to plaintiff's response on the state action issue, which was raised by cross-petition and addressed in Point I of Respondents' Brief. (Resp. Br. at 11-18.) However, in passing, defendants feel compelled to respond briefly to plaintiff's repeated allegations of misrepresentation and improper limitation of issues.

Regarding the facts, defendants have carefully documented each assertion with citations to the record and the Court of Appeals opinion. Defendants stand behind those assertions and invite the Court to verify any of the citations. Defendants have never stated or implied that plaintiff's unsavory social history or paternal indifference rendered his rights unimportant or undeserving of protection, only that the degree of protection required is not equal to that accorded married or registered fathers. Plaintiff cannot escape or cloud the facts, however uncomplimentary they may be, with claims of misrepresentation and distortion.

As for the scope of issues on appeal, defendants demonstrated that neither the state action issue, the state equal protection argument, nor the adoption by acknowledgment argument was timely raised on appeal. (Resp. Br. at 11, 34 n.5, and 44.) Plaintiff responds that the issues were "briefed" and that defendants are merely trying to avoid the issues. (Reply Br. of Pet. at 13, 19, and 20.) However, plaintiff fails to

clarify that he addressed the state action and state equal protection issues only in his Reply Brief to the Court of Appeals (Reply Brief of Appellant to Ct. of App. at 8, 13), after it was too late for defendants to respond. Accordingly, under this Court's appellate rules those issues may not be considered. Von Hake v. Thomas, 759 P.2d 1162, 1169 n.6 (Utah 1988). Plaintiff's discussion of the adoption by acknowledgment statute was buried indistinguishably in his federal equal protection argument. (Brief of Appellant to Ct. of App. at 15-17), and was raised as a separate argument for the first time in this Court. Therefore, that issue, as well, was raised too late. Madsen v. Brown, 701 P.2d 1086, 1088 (Utah 1985).[1] It is apparent, then, that defendants do not seek to avoid properly raised issues, but to maintain fair and orderly presentation of issues.

SUMMARY OF ARGUMENT

Plaintiff abandoned the state action issue by failing to raise it until his Reply Brief to the Court of Appeals;

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[1] Plaintiff cites a footnote in defendants' Memorandum In Opposition to Motion for Preliminary Injunction as evidence that the adoption by acknowledgment issue was disputed in the district court and should be remanded there for resolution. (Reply Br. of Pet. at 20.) However, the order denying a preliminary injunction is not on appeal; rather, it is the Judgment granting defendants' Motion for Summary Judgment. The adoption by acknowledgment issue was not raised by that motion, and plaintiff never claimed that it was disputed or that there were any issues precluding summary judgment.

accordingly, the Court of Appeals erred in addressing the issue.

This Court is in no way bound by the state action ruling of the federal district court. L.D.S. Social Services did not engage in state action by accepting temporary custody of the illegitimate newborn.

ARGUMENT

DEFENDANTS ENGAGED IN NO STATE ACTION TO INVOKE THE PROTECTIONS OF THE FEDERAL AND STATE CONSTITUTIONS.

As addressed in Respondents' Brief, pages 11-12, and summarized above, plaintiff abandoned the state action issue by failing to raise it until his Reply Brief to the Court of Appeals. Von Hake v. Thomas, supra. Plaintiff offers no justification for his failure to raise the issue in a timely manner and provides no authority for consideration of the issue by the Court of Appeals. (Reply Br. of Pet. at 19.) Therefore, the Court of Appeals' state action ruling should be reversed on that basis alone.

On the merits of the state action issue, plaintiff asks this Court simply to "adopt" the federal court ruling in Swayne v. L.D.S. Social Services, 670 F. Supp. 1537 (D. Utah 1987). (Reply Br. of Pet. at 18.) However, as demonstrated in Respondents' Brief, pages 14-18, this Court's blind adherence to that federal decision is neither required nor desirable.

While the issue of state action under 42 U.S.C. § 1983 is governed by federal law, this Court is not bound by a lower

federal court's construction of federal law. Beckmann v. Beckmann, 685 P.2d 1045, 1049 (Utah 1984) (state court not bound by bankruptcy court adjudication); Graham v. Scissor-Tail, Inc., 28 Cal.3d 807, 623 P.2d 165, 179 (1981) (state court is "under no obligation to follow federal lower court precedents interpreting acts of Congress when we find those precedents unpersuasive"); State v. Harmon, 107 Idaho 73, 685 P.2d 814, 817 (1984) (refusing to follow federal district court decision holding state statute unconstitutional). This is especially true when, as here, the federal question at issue is unsettled. Modern Supply Co. v. Federal Savings & Loan Ins. Corp., 50 Wash. App. 194, 748 P.2d 251, 254 (1987). In any event, since section 1983 applies only to the deprivation of federal constitutional rights, e.g., Bellevue Fire Fighters Local 1604 v. City of Bellevue, 100 Wash.2d 748, 675 P.2d 592, 597 (1984), what constitutes state action under state constitutional provisions is purely a question of state law, on which the federal Swayne decision has no relevance. See Swainston v. Intermountain Health Care, Inc., 766 P.2d 1059, 1061 (Utah 1988) (state court not bound by federal court's ruling on disqualification motion); Beal v. Turner, 22 Utah 2d 418, 454 P.2d 624, 625 (1969) (state court not bound by federal court decision on right to counsel at parole hearing).

The federal Swayne decision is not only uncontrolling, but unpersuasive. It is based on the false premise that L.D.S.

Social Services terminated plaintiff's paternal rights. As noted in Respondents' Brief, page 16, at the time the child was relinquished plaintiff's rights were not fully vested. Whatever inchoate rights he did have were surrendered or forfeited by his own indifference and inaction. Wells v. Children's Aid Society, 681 P.2d 199, 202 (Utah 1984). And that forfeiture is not legally final until the adoption decree is entered, permanently severing all natural parental rights and vesting those rights in the adoptive parents. Accordingly, L.D.S. Social Services' act of accepting temporary custody of the infant did not "terminate" plaintiff's rights and cannot be considered state action. (In addition to authorities cited in Respondents' Brief, see Shirley v. State National Bank, 493 F.2d 739, 744 (2nd Cir. 1974) (mere codification of common law does not give rise to state action); Rosewell v. Hanrahan, 523 N.E.2d 10, 12 (Ill. App. 1988) (no state action in private adoption proceeding).)

Finally, plaintiff argues, without authority, that this Court may address the constitutional issues regardless of state action. (Reply Br. of Pet. at 19.) Obviously, that is untrue. By the very language of section 1983 and the constitutional provisions at issue, state action is a necessary prerequisite to any relief. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982); Kruger v. Wells Fargo Bank, 11 Cal.3d 352, 521 P.2d 441, 444 (1974) ("private action, however hurtful, is not unconstitutional"); Nakamoto v. Fasi, 635 P.2d 946, 952 (Haw.

1981) ("constitutional safeguards were designed to protect the individual from [unlawful] conduct on the part of government officials"); Under 21 v. City of New York, 65 N.Y.2d 344, 482 N.E.2d 1 (1985) (good general discussion of state action principles).

CONCLUSION

Based on the foregoing, this Court should reverse the Court of Appeals' state action ruling on the grounds that (1) plaintiff abandoned the state action issue by not timely raising it in the Court of Appeals; or (2) defendants did not engage in state action.

DATED this 28th day of June, 1989.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing REPLY BRIEF OF RESPONDENTS/CROSS-PETITIONERS were mailed this 28th day of June, 1989, by United States Mail, postage prepaid, to the following:

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